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APPELLANT'S BRIEF

COURT OF APPEALS OF KENTUCKY

File No. 75-791

COMMONWEALTH OF KENTUCKY

Appellant

versus

LACEY T. SMITH

Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND DIVISION
HONORABLE JAMES C. BROCK,
JUDGE, SPECIALLY PRESIDING

BRIEF FOR APPELLANT

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FILED

OCT 13 1975

FRANCES JONES MILLS
CLERK
COURT OF APPEALS

This is to certify that a copy of the foregoing brief has been served on the Honorable James C. Brock, Circuit Court Judge, Honorable Frank Haddad, Jr., and Honorable James F. Neal, Attorneys for Appellee, by mailing postage pre-paid a copy of the foregoing, this 13 day of October, 1975.


Attorney for Appellant

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for the City of Louisville.

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BRIEF FOR APPELLANT

May it Please the Court:

I

STATEMENT OF THE CASE

The Appellee was indicted by the December 1974 term of the Jefferson County Grand Jury charging him with violation of Crimes and Punishments, KRS 432.350 § (1) (repealed 1974) which provides:

Any person who promises, offers, gives or causes or procures to be promised, offered or given any money or other thing of value, or makes or tenders any contract, obligation, gratuity or security for the payment of money or for the delivery or conveyance of any thing of value, to any member of the General Assembly or to any judicial executive or ministerial officer of this state, or to any county or city executive, ministerial, judicial or legislative officer, including members of boards of education and subdistrict trustees, after he has been elected, and before or after he has

been qualified and assumed office or taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding pending in the General Assembly or before such officer, or pending before any committee of the General Assembly, shall be fined not less than fifty dollars nor more than one thousand dollars, or confined in the penitentiary for not less than one nor more than five years, or both.

(emphasis added)

Pursuant to a Supplemental Motion to Dismiss filed by Attorneys for Appellee, the Circuit Court, Judge Brock, dismissed the indictment on the ground that the indictment was insufficient on its face, as, it failed to allege such "matter, cause, or proceeding" as was pending before the officer, whose decision was meant to be influenced by the payment of the bribe. It is from this Order of Dismissal that the Appellant herein seeks certification of the law on the interpretation to be given the term "pending" as is contained in KRS 432.350 § (1) supra; and the ultimate issue of whether the indictment in question was sufficient at law and the Honorable Trial Judge thus in error for ordering its dismissal.

II

STATEMENT OF THE FACTS

The Grand Jury charged that on December 20, 1973, the Appellee caused the sum of five thousand dollars (\$5,000) to be given by the Schwartz and Speckter Insurance Agency (hereinafter Insurance Agency) to the Appellee, for delivery to the Sloane For Mayor General Election Committee, with the intent to influence Harvey I. Sloane, Mayor of the City of Louisville in his decision in awarding the Insurance Agency contracts of insurance for the City of Louisville.

To wit, Appellants intended to prove at trial that Insurance Agency was desirous of obtaining contracts of insurance between itself and the City of Louisville and that agents of said Insurance Agency in December 1973, (after Harvey I. Sloane had assumed the office of Mayor, City of Louisville) contacted Appellee, who was the former campaign manager for Harvey I. Sloane's successful November 1973 election campaign, and that Appellee indicated that if Insurance Agency would contribute five thousand dollars (\$5,000) to the Sloane For Mayor General Election Committee to partially retire a debt existing thereof, Appellee would influence the Mayor of the City of Louisville, Harvey I. Sloane, to award contracts of insurance to said Insurance Agency.

Appellant further intended to prove that on December 20, 1973, the agents of said Insurance Agency did in fact give to the Appellee one check, drawn on the account of the Schwartz and Speckter Insurance Agency in the sum of five thousand dollars (\$5,000) and made payable to the Harvey Sloane For Mayor Campaign, that the Appellee in turn deposited said check in the bank account of the aforementioned Committee, and that the Mayor of the City of Louisville, Harvey I. Sloane, was influenced thereafter, to award to Insurance Agency on July 26, 1974 the position of Agent of Record (See Appendix I) for the City of Louisville which made Insurance Agency privy to fire insurance rate makeup schedules for property owned by the City of Louisville and which appointment placed Insurance Agency in position to advise executive officers of the City of Louisville as to various matters pertaining to insurance coverage for the City of Louisville.

That prior to the payment of the aforementioned five thousand dollar (\$5,000) bribe, Insurance Agency held no contract of insurance whatever, and that on August 7, 1974 Insurance Agency was awarded a contract of insurance for property owned by the City of Louisville total coverage valued at \$5,911,520.80, as a result of the payment of the aforementioned five thousand dollar (\$5,000) bribe, which insurance contract was awarded at the discretion of Mayor, City of Louisville, and not the result of competitive bidding.

III

ARGUMENT

A. That The Term "Pending" As Contained In KRS 432.350 § (1) supra Means The Period Of Time In Which The "Question, Matter, Cause, Or Proceeding" Which Was The Subject Matter Of The Bribe, Remains Unperformed Or Was Reasonably Foreseeable In Futuro At The Time Of Payment Of The Bribe.

This case is one of first impression in Kentucky; no case remotely on point in this jurisdiction can be found to guide the Court in its decision. Other jurisdictions are replete with decisions that interpret bribery statutes minutely differing from KRS 432.350 § (1) supra. Long ago, the California Court in People v. Markham, 64 Cal. 157 30 P. 62 (1883) passed upon Pen. Code § 68 which provided:

Every executive officer. . . who asks, receives, or agrees to receive any bribe, upon any agreement or understanding that his vote, opinion, or action upon any matter then pending, or which may be brought before him in his official capacity, shall be influenced thereby, . . .

/emphasis added/

This statute differs from KRS 432.350 § (1) supra as to the subject matter upon which a bribe may be given (see emphasis supra), and clearly includes subject matter not existing in praesenti

at the time of the payment of the bribe. Thus payment of a bribe to influence a public officer not to arrest persons engaged in violating a gaming ordinance was clearly a violation under the California Code supra, People v. Markham, supra.

In State v. Jalbert, 214 A. 2d 819 (Maine 1965) the Court faced a similar problem when it interpreted 17 M. R. SA § 601 (the Maine bribery statute) to apply to any matter pending or that may come legally before the officer in his official capacity. Thus, this statute proscribed conduct of an Associate Judge for a Municipal Court who took a gratuity and valuable consideration to influence his action, vote, opinion, and judgment on certain matters pertaining to the bribe giver and that might legally come before him in his official capacity as Associate Judge.

The Missouri legislature at 558.090 RS Mo 1969 enacted proscriptions that include payment of any gift, consideration, gratuity, or reward to a defined class:

. . . First, under any agreement that his vote, opinion, judgment, or decision shall be given for any particular person, or in any particular manner, or upon any particular side, or more favorable to one side than the other in any election, matter, cause or proceeding which may be pending or be brought before him in his official capacity. . .

State v. Wilbur, 462 S.W. 2d 653 (Mo. 1971)

This statute goes beyond that cited in People v. Markham, supra, and in State v. Jalbert, supra in that it not only prohibits payment to a defined class to influence any matter or cause pending or that may be brought before one of the defined class but prohibits payment to one in the defined class to obtain favor for the payor in any matter, cause, or proceeding that may come before the payee in his official capacity.

While these cases are not controlling in the instant case at bar, they serve to illustrate differing degrees of

foreseeability as to the subject matter upon which the payment of a bribe is intended to influence. This spectrum ranges from subject matter foreseeable at the time of payment of a bribe to subject matter that is not foreseeable at the time of payment of the bribe but is associated with a particular person or side.

The Court, in the case presently at issue, is urged to adopt the definition for the term pending as found in Vehling v. State, 196 N.E. 107 (Ind 1935) there the Court held at page 109-110:

So long as any of the duties imposed upon an officer in a particular matter remains unperformed the matter is pending. . .

Applying this definition to the case at hand, when on December 20, 1973, Appellee caused a five thousand dollar (\$5,000) check to be delivered to the Sloane For Mayor General Election Committee with the intent to influence the Mayor of the City of Louisville in his discretion in awarding to Insurance Agency contracts of insurance for the City of Louisville the "question, matter, cause or proceeding" therein pending, was appointment of Agent of Record for the City of Louisville.

The Agent of Record for the City of Louisville served at the complete pleasure of the Mayor of the City of Louisville and could be removed instantaneously at any time. The authority to change the appointment of Agent of Record existed unceasingly and thus the particular "question, matter, cause or proceeding" was unperformed, and pending under the definition cited in Vehling v. State, supra.

This subject matter alone is sufficient to hold that some "question, matter, cause or proceeding" was pending at the time of the payment of the bribe; however, the Court is also prompted to look to the second issue the Appellants contend was pending as of the time of the bribe payment. That being the more difficult question of the in futuro expectation of insurance contracts with the City of Louisville.

As to this point, when on December 20, 1973, the bribe payment was caused by Appellee, there existed the specific knowledge by Appellee that over the next six months certain fire insurance contracts for property owned by the City of Louisville would lapse and that because these policies were not open for bid there existed opportunity for Appellee to influence the Mayor of the City of Louisville as to whom these contracts would be awarded to upon renewal.

It is argued that the Kentucky Legislature by enactment of KRS 432.350 § (1) supra intended to restrict the subject matter of bribery to that reasonably foreseeable at the time of payment and to foreclose the proscription contained therein to subject matter only in contemplation of a mere probability that the payee may be called to "vote or decide" on the subject matter. see *In re Yee* 83 F. 145 (Dist. Ct. N.D. Wash. 1897)

If the opposite interpretation is adopted, it could reasonably be argued that conduct similar to that found in People v. Markham, supra, would not be violative of KRS 432.350 § (1) supra as the subject matter was in futuro and incapable of an in praesenti vote or decision to bring it within the statutory proscriptions. The subject matter in the case presently at bar was however, reasonably foreseeable under the interpretation advocated by Appellants and thus violative of KRS 432.350 § (1) supra.

As used in KRS 432.350 § (1) supra, "pending" was inserted by the Kentucky Legislature to limit the proscriptions contained therein to subject matter reasonably foreseeable at the time of payment of the bribe and thus causally connected thereto. The insertion of the term "pending" by the Legislature was meant to exclude from the criminal sanctions of that statute only instances where payment of the bribe was related to the subject matter in futuro to the extent that payment was only in contemplation of a

mere probability that the payee may be called to act upon that subject matter as in In re Yee Gee, supra, or factual situations where the promise, offer, gift, or the causing thereof or the procurement of the promise, offer, or gift or the tendering of any contract, obligation, gratuity or security for the payment of money or for the delivery of conveyance of any thing of value to the defined class is subsequent to the termination of the vote or decision meant to be influenced thereby. In this latter situation all circumstances surrounding the bribe would be ex post facto to the vote or decision on the subject matter intended to be influenced and by termination thereof the public officials vote or decision could no longer be influenced.

If the restrictive interpretation is adopted by the Court, there will exist in the law a situation whereby the rationale behind the bribery statute may be successfully circumvented by completion of the payment of the bribe and the influencing of the vote or decision or the intended subject matter thereto, prior to such time as the subject matter would be in the precise position to be termed "pending" under a definition that held that term to mean, during the time the formal process of vote or decision has begun and the matter capable of immediate in praesenti vote or decision that will permanently conclude and terminate all vote or decision on the subject matter. In the operations of government many matters may be in the strictest sense "pending" only for the length of time necessary to conceive a thought and transform that thought into action.

B. That RCr 6.10 and 6.12 When Read Together Statutorily Permit Dismissal Of An Indictment Only Where To Do Otherwise Would Prejudice The Substantial Rights Of The Defendant Upon The Merits.

In Kentucky RCr 6.10 provides the statutory requisites of indictments.

(2) The indictment or information shall contain, and shall be sufficient if it contains, a plain, concise and definite statement of the essential facts constituting the specific offense with which the defendant is charged. . .

Applying this statute to the case currently at bar, the indictment informed Appellee (a) of the offense with which he was charged, (b) of the act of which complaint was being made, and (c) of the claim of causing a bribe to be given, and (d) the caption contained the number of the statute - KRS 432.350 § (1), supra. Ward v. Commonwealth, 444 S.W. 2d 896 (Ky 1969) held this information to adequately appraise the defendant of the charge levied against him by the grand jury.

In the case of Johnson v. Commonwealth, 299 Ky 72 184 S.W. 2d 212 (1944) at page 213 the Court reaffirmed Commonwealth v. White, 57 Ky 492 (1857) when it said:

The object of these and all provisions is, that the defendant may be informed, with reasonable certainty, of the charge upon which he is to be tried, and that such trial may be a bar to any future prosecution for the same offense.

And in Rose v. Commonwealth, 294 Ky 279 171 S.W. 2d 435 (1943) at page 436 reaffirmed by Martin v. Commonwealth, 276 S.W. 2d 19 (Ky 1955) the Court held:

. . . the indictment must be read as a whole and if when so read it fairly and reasonably appraises the accused of the offense, and is complete in describing the acts constituting the offense, the indictment, . . . is sufficient.

In the present case, the Appellee was informed that the subject matter of the bribe he caused to be given to the Sloane For Mayor General Election Committee was insurance contracts for the City of Louisville. When the indictment is read as a whole and compared with the words of the statute defining the offense charged as cited in the indictment, the Appellee could reasonable only conclude that insurance contracts with the City of Louisville was the subject matter that was pending at the time of the alleged

offense. In addition, Appellee was furnished transcripts of testimony of all witnesses testifying before the Jefferson County Grand Jury with regard to the investigation that culminated in the indictment of Appellee. These transcripts specifically detailed the circumstances surrounding causation of the bribe and the subject matter intended to be influenced thereby.

The Honorable Trial Judge, however, dismissed the indictment because it failed to label the insurance contracts for the City of Louisville as the subject matter that was "pending" at the time of the alleged offense. But see Knuckles v. Commonwealth, 261 S.W. 2d 667 (Ky 1953) where in a similar case the Court refused to invalidate an indictment that failed to include "unlawfully and maliciously" in the accusatory part of the indictment and held the indictment valid because when read and considered the descriptive part of the indictment fairly and reasonably appraised the accused of the offense as did the indictment in the present case.

RCr 6.12 provides:

An indictment or information shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected for any defect or imperfection which does not tend to prejudice the substantial rights of the defendant upon the merits.

See Martin v. Commonwealth, supra, affirming.

IV

CONCLUSION

For the foregoing reasons the Appellant submits that the indictment is valid and the opinion of the Circuit Court be reversed and the indictment reinstated.

Respectfully submitted,

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HARVEY I. SLOANE M.D.
MAYOR

CITY OF LOUISVILLE
KENTUCKY

OFFICE OF THE MAYOR

July 26, 1974

Insurance Services Office
Starks Building
Louisville, Kentucky 40202

Gentlemen:

Please recognize Schwartz and Speckter Insurance Agency, Inc., 2022 Commonwealth Building, Louisville, Kentucky, as my agent of record and representative on insurance matters in connection with my properties shown on the attached statement of values located in Louisville, Jefferson County, Kentucky.

If desired, please make available rates in advance of publication and statement of values on file.

Thank you for your cooperation.

Very truly yours,

A handwritten signature in cursive script, reading "Daniel D. Briscoe", is written over the typed name.

Daniel D. Briscoe
Executive Assistant

DDB:clh

Enclosure